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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNITED CREDIT BUREAU OF AMERICA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a state court action to recover damages for fraud may be barred by the Federal judiciary solely because one element in the fraudulent scheme alleged is abuse by a former employee of the remedies afforded by the National Labor Relations Act.

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PETITION FOR A WRIT OF CERTIORARI
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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 643 F.2d 1017 (4th Cir. 1981) and also is printed at A. 1-21. The opinion of the Administrative Law Judge, which was affirmed by the National Labor

Relations Board, is reported at 242 N.L.R.B. No. 138, 101 L.R.R.M. 1277 (1979), and is also printed at A. 22-43 for the convenient reference of the Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on March 10, 1981. A Petition for Rehearing was denied by the Court of Appeals in its Order dated April 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of Maryland, Declaration of Rights

Article 19. Remedy for injury to person or property.

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

Title 29 United States Code
Labor-Management Relations

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

****

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

STATEMENT OF THE CASE

On October 28, 1977, Petitioner rejected a list of unrealistic "demands" submitted by Tonia Anderson, an employee of some six months, and when she persisted in her demands, terminated her employment. On October 31, 1977 a charge was filed with the National Labor Relations Board (Case 5-CA-8985) which alleged that Petitioner discriminated against Tonia Anderson by terminating her employment and thereafter refusing to reinstate her because she engaged in protected concerted activities on behalf of her fellow employees and/or because of her Union activities, thereby violating Section 8(a)(1) and (3) of the National Labor Relations Act, all of which Petitioner denied.

On the day before the hearing before the Administrative Law Judge of the National Labor Relations Board, Petitioner filed a civil lawsuit against Tonia Anderson in the Superior Court for Baltimore City, seeking to recover damages based upon a fraudulent scheme which Petitioner contends the employee contrived in order to obtain a paid "vacation" to take a honeymoon with her new husband. The suit alleges that the employee knew that if she could manage to get herself fired and file a complaint with the NLRB, the "settlement" procedures of the NLRB (if Petitioner acquiesced) would result in her being reinstated, with back pay, within a relatively short period of

time. The suit was filed the day before the initial hearing before the NLRB (so as not to appear retaliatory for her testimony) and was not served until after the March 22, 1978 hearing (so as to not influence her testimony) and to the utmost extent possible was kept secret from United's employees (so as to not "coerce or restrain employees from exercising rights under the National Labor Relations Act").

Thereafter, a second charge was filed (Case 5-CA-9344) on March 29, 1978 and on May 24, 1978 a complaint issued in that case, alleging that Petitioner violated Section 8(a)(1) and (4) of the National Labor Relations Act by initiating and filing a civil lawsuit against Tonia Anderson "all because she participated in the investigation and gave testimony" in Case 5-CA-8985. On the second page of the complaint in Cast 5-CA-9344, the Notice of Hearing stated that a hearing on the allegations in the complaint would be held on June 27, 1978:

> Please take notice that *on the 27th day of June, 1978,* at 10:00 A.M., E.D.T., and continuing on consecutive days thereafter until completed, in the hearing room, 9200 Garmatz Federal Building and Court House, 101 West Lombard Street, Baltimore, Maryland *a hearing will be conducted* before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place *you will have the right to appear* in person, or otherwise, and *give testimony.* (Emphasis supplied).

In its answer to the complaint in Case 5-CA-9344, Petitioner admitted that the civil lawsuit was filed against Tonia Anderson, but denied the commission of the unfair labor practices alleged. In a separate action, the General Counsel sought a temporary injunction under Section 10(j) of the Act against the further prosecution of Petitioner's civil lawsuit, which injunction was issued by the United States District Court for the District of Maryland. (Petitioner appealed the Order of the District Court, but the appeal became moot before the Court of Appeals could decide it.)

On May 31, 1978, the General Counsel filed a motion to reopen the hearing in Case CA-5-8985 and to consolidate the two complaints. On June 5, 1978, Petitioner was ordered to show cause why the General Counsel's motion should not be granted, and on June 6, 1978, Petitioner filed an answer opposing the General Counsel's motion. On June 19, 1978, a telegraphic order was issued by the Administrative Law Judge granting the General Counsel's motion. Petitioner received that order on June 21, 1978.

On June 20, 1978, the General Counsel filed a motion for judgment on the pleadings in Case 5-CA-9344 or in the alternative for summary judgment, a copy of which Petitioner received on June 21, 1978. On June 22, 1978, Petitioner received another telegraphic order from the Administrative Law Judge stating that a hearing would be held June 23, 1978. That order stated:

> "Re the United Credit Bureau of America, Inc. 5-CA-8985
>
> *The hearing* in the above-captioned cases *will be held June 23, 1978*, at 10:00 A.M. Edward A. Garmatz Federal Bldg., 9th Floor, 101 West Lombard Street, Baltimore, Maryland 21202". (Emphasis supplied.)

Having first been notified that an evidentiary hearing on the allegations of the complaint would be held June 27, 1978, next having received the General Counsel's motion for judgment on the pleadings on June 21, 1978, and then having received the telegraphic order stating that a hearing would be held on June 23, 1978, Petitioner was led to believe, at that time, that the purpose of the June 23 hearing would be to determine the merits of the motion for judgment on the pleadings. Petitioner's counsel therefore went to the June 23, 1978 hearing ready to show that there were several genuine issues of material fact in dispute. Several witnesses that were prepared to testify on behalf of United on June 27, 1978 did not come to the June 23rd hearing. These were witnesses which United expected would rebut assertions made by Tonia Anderson at the March

22, 1978 hearing to the effect that she had been acting in concert with other employees when discharged, and would establish that she had filed her charge with the Board for improper motives.

The Administrative Law Judge noted at the outset of the June 23rd hearing that the issue of the General Counsel's motion for judgment on the pleadings was before him; he was then informed by the General Counsel that no evidence would be presented on the Board's behalf, that the General Counsel would rest its case upon the pleadings, to wit, the complaint filed in Case 5-CA-9344 and Petitioner's answer thereto. The Administrative Law Judge then inquired of Petitioner's counsel whether Petitioner would adduce any evidence. The General Counsel, who had the burden of proof with respect to the alleged interference, restraint or coercion of Petitioner's employees, all necessary elements under Section 8(a)(1) of the Act, as well as the burden of proving discriminatory intent under 8(a)(4) of the Act, had neglected to offer any proof in support of the complaint alleging violation of Section 8(a)(1) and (4). Since the General Counsel had taken this position, counsel for Petitioner indicated that no evidence would be presented on behalf of Petitioner, in view of Petitioner's belief that the filing of a state court action, standing alone, would not support a finding adverse to Petitioner in the second case, i.e., that the civil lawsuit based on fraud had been filed as a tactic calculated to restrain or coerce employees in the exercise of their rights under the Act. Further, the National Labor Relations Board was not the proper forum to give Petitioner the relief it sought in its fraud action, and that action, if successfully concluded, would rebut the evidence in the first case. It was and is Petitioner's belief that the National Labor Relations Act does not protect fraudulent conduct.

After hearing legal arguments from General Counsel and scheduling of briefs, the hearing was adjourned. No hearing was held on June 27, 1978, and on March 21, 1979, the Administrative Law Judge rendered his decision against Petitioner, based upon inferences drawn from the pleadings alone and the absence of evidence to rebut those inferences (A. 24, 38). Exceptions were duly taken, and on June 8, 1979, the NLRB

rendered a final Decision and Order on both unfair labor practices finding, *inter alia,* that in light of the absence of Petitioner's proof that its civil action based on fraud had a "reasonable bases", it constituted an unfair labor practice and ordering, *inter alia,* that Petitioner cease and desist from its prosecution of the State Court proceeding.

The temporary injunction issued by the United States District Court for the District of Maryland under Section 10(j) of the National Labor Relations Act was dissolved upon entry of the final Decision and Order (as required by the NLRA), and Petitioner promptly filed a Petition for Review pursuant to Section 10(f) of the Act, while the Board filed a Cross-Application for Enforcement pursuant to Section 10(e) of the Act, with the Fourth Circuit Court of Appeals. Immediately after the temporary injunction was dissolved Petitioner endeavored to take Anderson's deposition, which was stopped by a Motion for Protective Order while the NLRB filed a Motion for Temporary Injunctive Relief *Pendente Lite* with the Fourth Circuit Court of Appeals under Section 10(e) of the Act. The temporary injunctive relief was not granted. The Court of Appeals, on March 10, 1981 rendered an Opinion and Decision granting enforcement as requested by the NLRB. A Petition for Rehearing *In Banc* of the Fourth Circuit Court of Appeals was denied. A Stay of Mandate was sought and obtained by Petitioner pending the filing of this Petition for Writ of Certiorari.

Meanwhile, the state courts in Maryland, notwithstanding that the Petitioner's Declaration fully and properly stated a cause of action upon which relief could be granted, nevertheless sustained a demurrer to the declaration based upon the pre-emption doctrine. The decision of the state court has been appealed to the Maryland Court of Special Appeals and is currently scheduled for argument on June 17, 1981.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BY THE FOURTH CIRCUIT COURT OF APPEALS IN THIS CASE AND DECISIONS OF THE COURTS OF APPEALS IN THE SECOND, SEVENTH, EIGHTH AND NINTH CIRCUITS.

The Administrative Law Judge's finding in this case that the Petitioner's lawsuit was "filed purely for purposes of retaliation to punish Anderson for seeking redress for her discharge from the Board and to discourage other employees from ever emulating Anderson in seeking to enforce their rights" was based upon inferences drawn from the pleadings standing alone and the absence of evidence to rebut those inferences. Further, in drawing these inferences, the A.L.J. stressed the "lack of merit" to the underlying tort claim, although without any evidence before him on the merits. The National Labor Relations Board adopted *in toto* the findings of the Administrative Law Judge, and the Court of Appeals essentially accepted without question the conclusions of the National Labor Relations Board relative to the motivation for Petitioner's lawsuit.

In *Power Systems, Inc. v. N.L.R.B.*, 601 F.2d 936 (7th Cir. 1979) the Seventh Circuit refused to accept the finding of the National Labor Relations Board that an employer's lawsuit against a former employee was "without reasonable basis and for an improper purpose" because the finding was based upon inferences, and not facts established in the record. Although in *Power Systems* there were facts contra to the inferences, there was at least one fact clearly supporting the inference that the suit was calculated to restrain or coerce an employee, i.e., a prayer for injunctive relief. In this case, there are no facts to support such an inference whatsoever. That there were no facts contra to the inferences of improper motive does not establish

facts supporting the inferences and therefore there is no "substantial evidence on the record as a whole" in this case supporting the Board's finding. To this extent, therefore, the decision of the Fourth Circuit is in conflict with the decision of the Seventh Circuit.

The absence of evidence to support an inference of Petitioner's objective in filing a lawsuit in this case also places the Fourth Circuit's decision in conflict with the decision of the Eighth Circuit in the case of *Associated General Contractors of N.D. v. N.L.R.B.*, 637 F.2d 556 (8th Cir. 1980). In that case, the court held that "the Board and the courts have not abandoned the inquiry proposed in *Retail Clerks, supra,* 89 L.R.R.M. at 1410, to determine whether the filing of the lawsuit in question 'is the kind of tactic calculated to restrain employees or employers in the exercise of rights guaranteed by the Act.' In our view, this is what is required in determining whether there is an 'unlawful objective' in the filing of the lawsuit." 637 F.2d 562. In this case, no such inquiry was made, and in fact the timing of the filing of the suit and of its service on Anderson, and the absence of any indication whatsoever that any of Petitioner's employees (other than top management) knew of the suit, all militate against the inference drawn by the Board and accepted by the Fourth Circuit. The inquiry was dispensed with and inferences drawn from naked pleadings alone were substituted for "substantial evidence on the record" to support the Board's findings.

Further, in both *Associated General Contractors, supra,* and in *Power Systems, supra,* the Courts of Appeal specifically rejected the reasoning that if no reasonable basis for filing a civil lawsuit is shown, an unlawful objective *must* be inferred. In *Associated General Contractors* the Eighth Circuit Court of Appeals went even further in finding that the validity of the underlying cause of action in the civil lawsuit was *not* determinative of the unlawful objective question, yet the NLRB in this case placed great weight on the absence of evidence showing the "reasonable basis" of the civil lawsuit.

The conflict between the decision of the Fourth Circuit on the one hand and the Seventh and Eighth Circuits on the other, therefore, concerns what findings must be made before

a civil lawsuit arising in a labor relations context may be barred, and on what "facts" these findings may be properly based. In the Fourth Circuit's decision a mere inference of punitive intent drawn from naked pleadings and an absence of a showing that the underlying cause of action in the civil lawsuit is valid is sufficient to support a finding that Petitioner's lawsuit was filed with an unlawful objective. Further, the Board did not define an unlawful objective as filing a suit "as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act" which in itself suggests that the law has not been properly applied in this case. Although the Fourth Circuit evidently noticed this omission, the Court was nevertheless not persuaded that this was a fatal omission. In the Seventh and Eighth Circuits, however, finding that a lawsuit has been filed for an unlawful objective must be supported by "substantial evidence", and that evidence must affirmatively show an unlawful objective in filing the suit, and specifically must show that it was filed as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act.

In the Second and Ninth Circuits, the Courts of Appeal decisions suggest that in order for a union's or employer's civil suit against an employee to be deemed properly barred as an unfair labor practice it must be shown, over and above an improper motive, that the court's processes were being utilized for collateral purposes not related to the suit in question, i.e., abuse of process. See *Lodges 743 and 1746, Etc. v. United Aircraft*, 534 F.2d 422 (2nd Cir. 1975) and *Bergman v. N.L.R.B.*, 577 F.2d 100 (9th Cir. 1978) (An exception to this general rule, recognized in the Ninth Circuit, is a case where the civil lawsuit seeks specific performance, which undeniably constitutes a direct effort to coerce or restrain employees. See *United Stanford Emp., Etc. v. N.L.R.B.*, 601 F.2d 980 (9th Cir. 1979.)

In the instant case, however, Petitioner sought neither injunctive relief (as initially sought by the employer in *Power Systems, supra*) nor specific performance (as sought by the union in *United Stanford, supra*) nor is there *any* indication of abuse of process on the part of Petitioner. Nevertheless, the Fourth Circuit has found Petitioner's suit to be an unfair labor

practice *and* to be pre-empted by the federal labor law because it presented the "same controversy" to the state court as had been presented to the National Labor Relations Board.

Even assuming that the decisions of the Second, Seventh, Eighth and Ninth Circuits might be distinguished on facts or law, the decision of the Fourth Circuit in this case is in conflict with the decisions of this Court.

II.

THERE IS A CONFLICT BETWEEN THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS AND THE DECISIONS OF THE SUPREME COURT; OR, IN THE ALTERNATIVE, IF THERE BE NO CONFLICT, THE SUPREME COURT HAS NOT YET DECIDED THE ISSUES DECIDED BY THE COURT OF APPEALS BUT SHOULD DECIDE THEM.

The Court of Appeals for the Fourth Circuit held that since Petitioner's civil lawsuit was founded upon an alleged fraudulent exercise of arguably protected rights, and because there were "overlapping factual findings" which would be determinative of the issues of both case, Petitioner's civil lawsuit for fraud involved "the same controversy which could have been presented to the Board or to the state court" and was therefore pre-empted by federal labor law. In this analysis, the Court of Appeals appears to have looked for some common touch stones between the labor dispute and the lawsuit based on fraud and, having found some, the Court of Appeals did not hesitate to find that the controversies were the "same".

The holding of this Court in *Sears, Roebuck & Co. v. Carpenters*, 346 U.S. 180, 56 L.Ed.2d 209, 98 S.Ct. 1745 (1978) as it applies to the issues in this case teaches first that in deciding whether state court action is pre-empted by Federal labor law, the test is to determine whether a controversy presented to the state court is *identical* to or different from that which might be presented to the National Labor Relations Board (346 U.S. 197). *Sears* also indicates that the relevant

inquiry by which it is determined whether or not the controversies are "identical" is not whether there are similar issues, overlapping facts, or even whether the state court action is based upon activity which, absent the presence of tortious conduct, would clearly be protected (as in the instant case). At 436 U.S. 196 through 197, this Court reviewed again its analysis in *Farmer v. Carpenters*, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 (1977), and emphasized that it was the *focus* of the inquiry that would be made by the state court *vis-a-vis* the National Labor Relations Board which made the controversies that might be presented to either distinguishable, and prevented the controversies from being identical, notwithstanding they arose in the same factual setting. This Court made the same point again in the *Sears* decision at 436 U.S. 204 through 205 by emphasizing that certain activity which ordinarily clearly would be protected might lose its protected status if it occurred in connection with tortious activity (in the case of *Sears*, trespass) and said:

> Since it cannot be said with certainty that, if the Union had filed an unfair labor practice charge against Sears, the Board would have fixed the locus of the accommodation at the unprotected end of the spectrum, it is indeed "arguable" that the Union's peaceful picketing, though trespassory, was protected. Nevertheless, permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected. For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that trespass is far more likely to be unprotected than protected. (436 U.S. 205).

The greatest distinction between the *Sears* case and the instant case, insofar as overlapping jurisdiction of the state courts and the National Labor Relations Board is concerned,

is that in *Sears* the trespass had already been proved in the state court proceedings. In this case, however, the Petitioner has had no opportunity to prove in the state courts the fraudulent scheme it has properly alleged, and the National Labor Relations Board is not equipped to weigh the merits of a cause of action based on fraud. That trespass may be easier to prove than fraud should be no rationale for precluding Petitioner from the *opportunity* to prove fraud in the forum appropriate to hear such a case.

If this Court's decision in *Sears* was not intended to go so far as Petitioner contends here in giving guidance as to when a controversy may be properly brought before a state court notwithstanding a labor relations factual setting, then Petitioner is unaware of any decision of this Court which does provide such guidance. Therefore, if the decision of the Fourth Circuit Court of Appeals is not in conflict with the decision of this Court in *Sears*, then the issue presented in the instant case has not been decided by this Court, but ought to be, because of the special and important considerations involved.

III.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR THE SUPREME COURT TO REVIEW THE INSTANT CASE.

The National Labor Relations Board in the instant case, whether intentionally or not, has expanded its jurisdiction beyond that which it has enjoyed previously. In this case, as in the case of *Power Systems, supra*, the National Labor Relations Board has inferred that a lawsuit filed by an employer has an unlawful objective. Such an inference was essential since there were no facts to show an unlawful objective on the part of Petitioner. The inference was also essential to a finding that Anderson's first unfair labor practice charge was meritorious and warranted the imposition of sanctions by the National Labor Relations Board. However, assuming Petitioner's contention that the filing of the initial unfair labor practice charge was only part of a fraudulent scheme is true, then it could

hardly be said that the filing of that charge retains its protected status, nor could it be argued that Petitioner's lawsuit based on fraud had an unlawful objective. Yet only the state courts are fully qualified and equipped to weigh the merits of a cause of action based upon fraud. By relying on inferences, therefore, the National Labor Relations Board seeks to deny Petitioner the opportunity to show that the initial charge filed on behalf of Anderson was improper and an abuse of the Board's processes, and also seeks to deny Petitioner the opportunity to seek redress in the state court for the tort of fraud.

In the past, the National Labor Relations Board accommodated its processes to the right of litigants to have their controversies adjudicated by a state court absent a showing that the state court proceedings were initiated for an unlawful objective, i.e., calculated to restrain employees in the exercise of rights under the Act, and subjective intent of the employer was not determinative of the issue. With respect to Petitioner's civil lawsuit for fraud the National Labor Relations Board has inferred an improper intent, which it has then projected to an unlawful objective, without any facts to support a finding of either. Further, the Board has not even found that the filing of Petitioner's civil lawsuit was "a tactic calculated to restrain or coerce employees in the exercise of rights under the Act", even though that is the critical inquiry under virtually all Courts of Appeal decisions. In effect, the Board is asserting that it may in the first instance determine whether or not a party before it has a meritorious tort claim. Once the Board makes that determination (whether based on facts or inferences), the party having the claim is precluded from proving its merits. This expansion of jurisdiction on the part of the National Labor Relations Board is unreasonable because the Board does not have the expertise to evaluate tort claims, nor are its proceedings appropriately designed to hear tort claims.

The importance of the issue presented in this case is manifest by the substantial activity in this area of the law during the past three years. This case began (in essence) in March of 1978, approximately one year after the decision of this Court in *Farmer v. Carpenters, supra,* and shortly before the decision of *Sears, Roebuck & Co. v. Carpenters, supra.*

The *Power Systems* case, *supra*, was decided by the Seventh Circuit Court of Appeals in 1979. The Ninth Circuit has decided cases dealing with the same or similar issues in 1978 *(Bergman v. N.L.R.B., supra)* and in 1979 *(United Stanford Employees, supra)*. The Eighth Circuit decided *Associated General Contractors, supra*, on December 31, 1980. There is another case with nearly identical issues in which oral argument was had before the Ninth Circuit on April 15, 1981: *Bill Johnson's Restaurant, Inc. v. N.L.R.B.*, No. 80-7266. There is yet another case addressing similar issues in which oral argument was heard before the Tenth Circuit Court of Appeals (case 79-1548) in November of 1980, but which has since been removed *sua sponte* by the Tenth Circuit to the District of Columbia Court of Appeals on March 2, 1981 *(George A. Angle v. N.L.R.B.*, cases 81-1287/81-1288).

With so many cases recently decided and currently pending throughout the United States, it can hardly be said that the issues raised in this case are merely academic, or of little interest to litigants other than the parties in the instant case.

The issues in this case are also vitally important because the right which Appellant seeks to exercise, free access to law courts to seek redress for injury, is both ancient and fundamental, having been originally assured by the Magna Charta. This right now is guaranteed by the Maryland Constitution in its Declaration of Rights, Article 19. The essence of the right is also guaranteed by the due process clauses in the United States Constitution. It is of vital concern and interest to potential and actual litigants throughout the country to know precisely when this right to access to the courts may be freely exercised, and how it can be reconciled with seemingly competing or conflicting rights created by Section 7 of the National Labor Relations Act, of comparatively recent origin. In light of the importance of the Constitutional rights which Petitioner seeks to exercise, it is of utmost importance that this Court consider and decide the issue raised in this case.

CONCLUSION

The Petitioner, The United Credit Bureau of America, Inc., respectfully prays that this Court will issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

Published
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 79-1419

THE UNITED CREDIT
BUREAU OF AMERICA, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Review of an Order of the National Labor Relations Board

Argued March 6, 1980 Decided March 10, 1981

Before WIDENER and SPROUSE, Circuit Judges, and HADEN, District Judge*

Edward L. Blanton, Jr. (Jay V. Strong, Jr., Douglas W. Grinnell on brief) for Petitioner; Richard A. Cohen, NLRB (Norton J. Come, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Peter M. Bernstein, NLRB on brief) for Respondent.

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*Charles H. Haden II, United States District Judge, Northern and Southern Districts of West Virginia, at Parkersburg, sitting by designation.

HADEN, District Judge:

The employer, United Credit Bureau of America, Inc., (United) petitions the Court to review and set aside an order of the National Labor Relations Board (Board); the Board cross petitions for enforcement. For reasons that follow, we grant enforcement.

At issue are the Board's procedures and its findings that United committed unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act by discharging employee Tonia Anderson for engaging in protected activities and in further violation of Sections 8(a)(4) and (1) of the Act by its retaliatory filing of a common law civil action against employee Anderson for her part in filing charges with the Board.[1]

I. Anderson's Discharge

Anderson was hired in April, 1977, as a probationary employee for 120 days, to be trained in United's business of compiling and transmitting credit information for commercial accounts. She was awarded a ten cent per hour wage increase on May 31, 1977, and her supervisors initially considered her performance to be good.

Prior to her discharge, Anderson shared lunch periods with other employees at United and engaged in conversations concerning desired improvements in working conditions. Following these discussions, Anderson made an appointment to meet with a representative of Amalgamated Local Union No. 1231, affiliated with Laborers International Union of North America. Anderson subsequently decided to forego the meeting with the Union representative and spoke directly with Patadora Hedrick, a second vice president for United and Anderson's immediate supervisor. On behalf of herself and others who were reportedly reluctant to come forward, Anderson informed Hedrick of desires for the following improved benefits: A longer lunch

[1] 29 U.S.C. §158(a)(1), (4)

period, paid maternity leave, sick leave and time off for perfect attendance. Hedrick told Anderson the requests would be passed along to the management staff.

Hedrick then informed Personnel Director Marie Welch and Executive Vice President Jack Sauber of Anderson's statements. These supervisors discussed what could be done "to save the employee" and so scheduled a meeting with Anderson. At the meeting held the following day, Sauber quizzed Anderson about her demands, explained the benefits United already provided employees, and stated why it could not provide others. After further discussion, including unsuccessful inquiry as to the identity of the other employees requesting improvements, Sauber informed Anderson that she was terminated because her attitude toward her job had changed and, therefore, she would be unable to perform her work satisfactorily. Anderson then was escorted from the building by Welch, who opined that Anderson was a good employee and who expressed a willingness to provide a favorable employment reference as to Anderson's abilities and performance.

II. United's Civil Action Against Anderson

Based upon Anderson's discharge, an affiliate of the Laborers International Union of North America, Amalgamated Local Union No. 1231, filed a charge with the Board, which issued a complaint on December 16, 1977, against United alleging violations of Sections 8(a)(3) and (1) of the Act.[2] (Case No. 5-CA-8985, discharge case). On March 21, 1978, United filed a civil action against Anderson in the Superior Court of Baltimore City.[3] A previously noticed hearing in the discharge

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[2] 29 U.S.C. §158(a)(1), (3).

[3] The relevant contents of the complaint or declaration are as follows:

"The Plaintiff, THE UNITED CREDIT BUREAU OF AMERICA, INC., a body corporate of the State of Maryland, by its attorneys, Edward L. Blanton, Jr. and Jay V. Strong, Jr., brings this suit against the Defendant, TONIA A. ANDERSON, and as its cause of action states:

case was held on March 22 by an Administrative Law Judge (ALJ). Subsequent to the Board hearing, Anderson was served with the process from the state civil action, and she then filed a second charge with the Board, which issued a complaint against

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Footnote 3 continued:

For that the Defendant, TONIA A. ANDERSON, on or about 11 April 1977, falsely represented to the Plaintiff her intention to enter into a long-term relationship of employment with the Plaintiff in a capacity for which she was not, by training or experience, suited, that the Defendant knew, at the time she made the foregoing representation, that it was false; that in fact she intended to work no longer than necessary to obtain the benefits of the Plaintiff's training program and secure a position as a *bona fide* employee of the Plaintiff and thereafter to provoke her discharge under circumstances which would permit her to file an unfair labor practice charge against the Plaintiff in the expectation that the Plaintiff would elect, as a matter of expediency, to accept an offer of settlement; that such settlement offer would, under standard procedures well known to the Defendant, be made on her behalf by the National Labor Relations Board, pursuant to which she would be offered reinstatement to her former position and payment of full wages for the period between the date of her discharge and the date Plaintiff accepted the offer of settlement, the effect of which would have been to secure for the Defendant a "paid vacation" to which she was not entitled, but which she would receive if her scheme were successful; that the false representation of her intentions was made to persuade the Plaintiff to pay her while she participated in its training program and to expend its money to provide instruction for her, which expenditures the Plaintiff made in the expectation that she intended to work for Plaintiff for a sufficient period to compensate Plaintiff for the time and money to train her; that the Plaintiff relied upon her representations with full belief in their truth; and had the Plaintiff not believed that the Defendant did not intend to so work, the Plaintiff would not have agreed to expend its time and money to train her; that the Plaintiff believed the Defendant's representations and had the right to rely upon her representations with full belief in their truth; and had the Plaintiff not believed that the Defendant did not intend to so work, the Plaintiff would not have agreed to expend its time and money to train her; that the Plaintiff believed the Defendant's representations to be truthful, did hire the

United on May 24 alleging violations of Sections 8(a)(4) and (1) (Case No. 5-CA-9344). On May 31, the general counsel moved to reopen the hearing in the discharge case and to consolidate the two complaints. On June 5, United was ordered to show cause why the general counsel's motion should not be granted, and on June 6, it filed an answer opposing that motion. After considering United's response in opposition, the ALJ issued an order by telegraph on June 12, granting the general counsel's motion. On the following day, the general counsel filed a motion for judgment on the pleadings or, alternatively, for summary judgment.

Footnote 3 continued.

Defendant and provide training for her, at great cost and expense to the Plaintiff and, in addition, paid the Defendant a full-time salary during the period she was being trained; that within ninety (90) days after her training period had been completed, the Defendant deliberately provoked an incident which she knew would lead to her dismissal as an employee of Plaintiff by making unreasonable demands upon the Plaintiff to change the conditions under which she worked, which conditions were explained to her prior to her accepting employment with the Plaintiff and to which condition she implicitly agreed by accepting employment; that she was, as a direct consequence of the incident, dismissed, and she immediately thereafter filed a complaint of unfair labor practice against the Plaintiff; that an offer in settlement was immediately made after a perfunctory investigation by the National Labor Relations Board, that, if the Plaintiff had accepted such offer, it would have been required to reinstate the Defendant and pay her back wages between the date of her dismissal and the date of her reinstatement; that the damages sustained by the Plaintiff as a result of the fraud perpetrated by the Defendant consist of wages paid to the Defendant by the Plaintiff during the training period, the *pro rata* cost of operating Plaintiff's training department during the period in which the Defendant was being trained by the Plaintiff and the cost of defending the charge of unfair labor practice filed by the Defendant against the Plaintiff;

WHEREFORE, the Plaintiff claims the sum of TEN THOUSAND ($10,000.00) DOLLARS." App. 9.

The ALJ conducted the hearing on June 23, 1978, where United renewed its objections to the consolidation. The general counsel's representative submitted the complaint from the state civil action into evidence and informed the ALJ that the general counsel would present no further evidence with respect to the 8(a)(4) and (1) charges based on the retaliatory lawsuit. United's counsel initially told the ALJ that United wished to present evidence with respect to the latter charge, but then decided against presenting evidence, stating "If the party with the burden of proof is not going to present any evidence in the proceedings, I don't think that I will present any evidence in rebuttal to the nonevidence that he's presented. . . ." App. 104. Counsel for United admitted that United filed the lawsuit against Anderson, but denied that it constituted an unfair labor practice, and orally moved for judgment on the pleadings in United's favor. App. 105. Without expressing an opinion on the merits, the ALJ suggested to United's counsel that the submission into evidence of the state court complaint might suffice to overcome a judgment motion, and that United would be well advised to produce rebuttal evidence. Nevertheless, United's counsel did not submit evidence, nor request a continuance but rather argued the merits of the actions, as did counsel for the Board. The parties subsequently submitted briefs in support of their positions.

III. The Board's Decision

The ALJ issued a decision in March, 1979, which was adopted *in toto* by the Board. 242 NLRB No. 138 (June 8, 1979). The Board found that "Anderson engaged in protected concerted activity, that [United] knew of that activity, and that Anderson was discharged because of it." The Board noted that, while United contended the discharge was because of Anderson's changed attitude the only manifestation of changed attitude was Anderson's request for improved benefits for herself and her fellow employees. Recognizing that United's subjective intent was not determinative as to whether Section 8(a)(1) had been violated, the ALJ concluded that United's

conduct reasonably could be viewed as interfering with the free exercise of rights under the Act, and, therefore, violated Section 8(a)(1).[4]

The Board also rejected United's defense that Anderson was discharged because management determined she had requested improvements only in order to provoke her discharge, so that she could file a charge with the Board which ultimately would be settled by United, all with the ultimate goal of obtaining a "paid vacation" at United's expense. In light of the evidence offered, the Board concluded "the premise of this defense is pure speculation." App. 129.

The Board further found that the evidence did not establish awareness by United of any union activity or involvement by any of its employees and, therefore, concluded that Section 8(a)(3) had not been violated by Anderson's discharge.

The Board additionally concluded that United violated Sections 8(a)(4) and (1) by filing the state court civil action against Anderson. While recognizing that the complaint sounded in fraud, the Board noted the action was premised upon Anderson's charge filed with the Board. The Board found Anderson had probable cause for filing that charge and that no evidence had been offered by United to support its claim that Anderson perpetrated the alleged scheme to use the Board's processes for her own nefarious reasons. United's resort to private litigation was found to have violated Section 8(a)(4) and (1) because the "civil action was filed purely for purposes of retaliation to punish Anderson for seeking redress for her discharge from the Board and to discourage other employees from ever emulating Anderson in seeking to enforce their rights." App. 131.

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[4]Indeed, the Board found the evidence went beyond this: "It is impossible to escape the conclusion that Sauber, Hedrick and Welch intended specifically that Anderson's discharge interfered with employee rights." App. 128.

IV. Disposition

In the Petition United contends that: (1) its rights to procedural due process were violated because it received insufficient notice of the matters to be considered at the June 23, 1978, hearing; and (2) the Board erred as a matter of law in finding that United committed an unfair labor practice by filing the state civil action against Anderson. United urges this Court to remand the case and stay the proceedings in the unfair labor practice charge pending disposition of the state civil action. All of United's arguments on appeal are addressed to its procedural due process claim and to the Board's findings on the state court civil action case; United does not urge in its brief here that the Board's finding that Anderson's discharge was unlawful is erroneous. The Board contends that its findings are supported by substantial evidence and must be affirmed.

A. The Discharge Case. Although not directly raised by United before this Court, we have reviewed the Board's finding that United's discharge of Anderson violated Section 8(a)(1). We conclude that finding is supported by substantial evidence on the entire record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). All the record evidence forcefully demonstrates that Anderson, a good worker in United's perception, was discharged because she engaged in protected activity. Likewise, it is apparent that United's action would have the likely effect of restraining or inhibiting other United employees from exercising rights protected under Section 7 of the Act.[5] See generally, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); R. Gorman, *Basic Text on Labor Law*, 132-133 (1976).

B. United's Procedural Due Process Claim. United argues its rights to procedural due process were violated because the ALJ failed to notify it of the specific matters to be considered at the June 23, 1978, hearing. The hearing on the second unfair labor practice charge originally had been scheduled

[5] 29 U.S.C. §157.

for June 27, as noticed by the complaint issued on May 24. As noted above, the general counsel filed his motion for judgment on the pleadings, or alternatively, summary judgment, in the second unfair labor case on June 20; United received a copy of this motion on June 21, and on June 22, United received a telegraphic order from the ALJ setting the hearing in the consolidated cases for June 23.

We conclude that United was not denied due process. Although the notice scheduling the June 23 hearing certainly may be considered ambiguous when viewed in its procedural context, United's actions at the hearing demonstrate that it suffered no resulting prejudice. First, United presented no evidence at the hearing, because, as the record manifestly demonstrates, United's counsel was of the opinion that the general counsel had failed to carry his burden of proof in the second unfair labor practice case. This was a tactical decision by United's counsel, and was not the result of misreliance upon a vague notice. Moreover, United asserted no claim of inadequate notice or prejudice at the hearing. It is clear that United was afforded a full and fair opportunity to defend the charges and it is too late now to contend otherwise.[6]

C. The 8(a)(4) and (1) Charges and the State Court Civil Action. In determining whether the commencement of a court action by an employer against an employee who has charged an unfair labor practice may constitute an unfair labor practice by the employer, our discussion must begin with reference to the

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[6]Parenthetically, we note that United's contention that it intended subsequently to present evidence is of no import. The ALJ adequately apprised counsel of the posture of the case at the June 23 hearing. It is clear that United offered no testimony for the reasons stated above, and not because it was unprepared. Moreover, if United was not prepared to present evidence at the June 23 hearing because it had been misinformed by a vague and untimely notice, then counsel for United should have requested a continuance. Considering the procedural history, a motion for continuance to gather and present rebuttal evidence would have been well founded.

"Clyde Taylor" doctrine. *Clyde Taylor, d/b/a Clyde Taylor Co.*, 127 NLRB 103 (1960). In that case, the Board recognized that Section 8(a)(1) may be violated when an employer threatens to file an action in the civil courts "as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." 127 NLRB at 108. There, the employer was held to have violated the act by threatening to file a libel action in state court against employees as retaliation for their filing charges with the Board. Conversely, the Board refused to find that the same employer violated Section 8(a)(1) by also obtaining a state court injunction against employees engaged in peaceful picketing, reasoning as follows:

> "The Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." 127 NLRB 109.

In the application of this broad principle to actions filed by employers and unions alike and involving a wide variety of civil issues related to labor management matters, the Board has demonstrated reluctance to find that parties resorting to the civil courts thereby violate the Act.[7]

On other occasions, the Board has found an exception to the broad policy of *Clyde Taylor* where a civil lawsuit actually

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[7]For cases where no violation of the Act was found, see: *S. E. Nichols Marcy Corp.*, 229 NLRB 75 (1977); *Sullivan and Associates*, 230 NLRB No. 55 (1977); *Retail Clerks Union Local No. 770 (Hughes Markets, Inc.)*, 218 NLRB 680 (1975); *Los Angeles Building and Construction Trades Council, AFL-CIO (Noble Electric)*, 217 NLRB 946 (1975); *Frank Visceglia and Vincent Visceglia T/A Peddie Buildings*, 203 NLRB 265 (1973); *United Aircraft Corp. (Pratt and Whitney Division)*, 192 NLRB 382 (1971). See also: *Bergman v. NLRB*, 577 F.2d 100 (9th Cir. 1978); *Lodges 743 and 1746, etc. v. United Aircraft*, 534 F.2d 422, 463-465 (2nd Cir. 1975).

was brought for the purpose of accomplishing an unlawful objective[8] or was deemed retaliatory in nature.[9]

Power Systems, Inc., 239 NLRB No. 56 (1978) *rev'd.*, 601 F.2d 936 (7th Cir. 1979) was the first case in which the Board found an employer to have violated the Act by actually filing a civil lawsuit against an employee.[10] There, the Board found the employer violated Section 8(a)(1) and (4) of the Act by filing a state court action against its former employee, Sanford, alleging Sanford had filed charges with the Board which were malicious, unfounded and brought for the purpose of harassing the employer. Finding that the employer had no reasonable basis for its lawsuit, the Board concluded that the suit was filed to accomplish an unlawful objective: i.e., to penalize Sanford for filing the charge and discouraging other employees from similarly seeking redress.

On appeal, the Court denied enforcement. In the Court's view, the record evidence overwhelmingly established that the employer indeed had a reasonable basis for filing the lawsuit. The unfair labor practice charge filed by its employee, Sanford, upon which the employer based its lawsuit, had been found by the general counsel to be without merit and the general counsel had declined to process the complaint. More significantly, the charging party had an established record of filing baseless and

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[8]*E.g., United Stanford Employees, Local 680, Service Employees International Union (Leland Stanford Junior University)*, 232 NLRB 326 (1977); *Television Wisconsin*, 224 NLRB 722, 779-780 (1976); *International Organization of Masters, Mates and Pilots, AFL-CIO (Cove Tankers)*, 224 NLRB 1626 (1976), *aff'd.* 575 F.2d 896 (D.C. Cir. 1978); *Power Systems, Inc.*, 239 NLRB No. 56 (1978), *rev'd.*, 601 F.2d 936 (7th Cir. 1979).

[9]See *West Point Peperell, Inc.*, 200 NLRB 1031, 1040 (1972) (employer demanded union withdraw unfair labor practice charges or else face lawsuit for damages).

[10]*United Stanford Employees, Television Wisconsin* and *Cove Tankers, supra*, fn. 5, each involved a lawsuit brought by a labor organization and, therefore, involved Section 8(b)(1)(A) of the Act.

irresponsible charges[11] so extensive that the Board's regional office had instituted a special procedure for handling charges filed by him.

The Court in *Power Systems*, therefore, simply held that the Board's findings were not supported by substantial evidence. Recognizing that its opinion did not address the legal parameters of the Board's power to find unfair labor practices in similar circumstances, the Court stated:

> "We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct." 601 F.2d 936, at 940.

We share this concern over the potential chilling effect of such lawsuits. Just as the National Labor Relations Act was enacted to establish the correlative rights of employers and workers, so was the Board created by Congress to enforce the provisions of that Act. The Board, however, cannot institute enforcement proceedings on its own, but must instead rely upon aggrieved parties to file charges. Accordingly, enforcement of the Act is directly dependent upon the willingness of persons to file charges, testify and provide other evidence to the Board. See *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Successful implementation of the Act thus requires that complete protection be given persons who, in good faith, file charges or testify. To this end Congress enacted Section 8(a)(4) which provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act." The Supreme Court has acknowledged the import of Section 8(a)(4) in the enforcement scheme of the

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[11] Sanford had filed 43 separate unfair labor cases over the years against various employers and labor organizations. Of these, 25 had been withdrawn, 14 dismissed, three settled and one resulted in a Board order. 601 F.2d 936, at 937. All this strongly demonstrated the employer's justification for the civil lawsuit, and so the Board's inference of unlawful motive was discredited factually.

Act. In *Nash v. Florida Industrial Commission, supra,* the Court stated:

> "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Id.* at 238.

Likewise, in *NLRB v. Scrivener*, 405 U.S. 117, at 122 (1972) the Court stated; "This complete freedom [to provide information to the Board concerning unfair labor practices] is necessary. . .'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.' " quoting, *John Hancock Mutual Life Insurance Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951).

United argues that the evidence does not support the Board's finding, and that the Board, in effect, granted summary judgment, which was erroneous because of the factual conflict as to United's motive. We conclude that the Board's decision was not a de facto grant of summary judgment, but rather was a judgment on the merits. Accordingly, we have no occasion to construe conflicting inferences in favor of United, but rather our inquiry is whether the Board's findings were supported by substantial evidence on the whole record.

Initially, we note agreement with the Board's characterization of United's lawsuit as analogous to an action for abuse of process. Central to Anderson's fraudulent scheme, as alleged in United's declaration, was provocation of her discharge by engaging in arguably protected activities; discharge for other reasons would not have provided a springboard to the Board's processes; and ultimately Anderson's gain of a "paid vacation." Thus, by its own pleadings, United has inextricably wedded its fraud action to the operation of the Board's processes. United's action thereby had the potential for direct collision with the policy of Section 8(a)(4), and thus merited the close factual examination given it by the Board.

The Board's decision was based upon the testimony concerning Anderson's activities and discharge, and the declaration

filed in the state court. This evidence amply supports the Board's finding that Anderson's original charge was meritorious, as previously discussed. Moreover, United did not adduce any evidence which would support its fraud theory. At the original hearing in the discharge case, counsel for United cross examined Anderson in an attempt to elicit facts to support the fraud theory. Boiled down, the only arguable basis of such a theory is: that Anderson was a college graduate working in a job requiring lesser skills (App. 69); that she was unhappy because United did not allow her time off on her wedding day (App. 77); and that she had exhibited a "bad attitude" in previous employment (App. 72).[12] At the reopened hearing on June 23, United declined to present direct evidence supporting its conspiracy theory, or that which would otherwise demonstrate that the civil action was filed for a lawful motive.

Inasmuch as the evidence provides no support for United's fraud theory, the facts are in stark contrast to those of *Power Systems*. There the sued employee had demonstrated a proclivity for filing meritless, harassing labor charges against his employer; here the single charge was meritorious.

United further argues that there is no evidence that Anderson's rights were interfered with, or that she was coerced given the fact that she was not served with process from the state court the day after the hearing in the discharge case. The Board rejected this contention and so do we. The immediate impact of defending the state court lawsuit most definitely serves to impose a punitive measure upon the charging employee. The violation of Section 8(a)(4) is thus clear. Likewise, the message to United's employees is clear: assertion of protected rights (rights found subsequently to be meritorious by the labor board) will subject you, as a United employee, to a retaliatory lawsuit and all the expense and trouble that goes with it. The violation of Section 8(a)(1) is thus clear. We conclude that substantial evidence supports the Board's finding that United's

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[12] Anderson quit working—or was terminated—from previous employment as a bill collector after she was assaulted by a customer and her employer refused to compensate for her torn clothing.

lawsuit filed against its charging employee, Tonia Anderson constituted violations of Sections 8(1)(4) and (1) of the Act.

D. Preemption. As a final contention, United argues that its state court cause of action is not preempted by federal labor jurisdiction under the rule of *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), and that it should be allowed to choose and proceed in a forum of its choice rather than in one "predisposed to reject it" (Petitioner's brief 24) and in which it cannot obtain relief. The Board thought otherwise and ordered United to cease and desist from prosecuting its civil action against Anderson and withdraw its complaint. (App. 133, 134). Because of this aspect of the Board's order we are obliged to address the preemption issue.

Generally, prior law held that where activity subject to state regulation was "arguably protected" by Section 7, or "arbuably prohibited" by Section 8, then preemption applied, and state jurisdiction had to yield.[13] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); see R. Gorman, *Basic Text on Labor Law*, 766-786 (1976). In *Sears*, the Court limited the above principle and recognized that state courts are preempted only in cases of arguably prohibited or protected union activity where the controversy presented to the state court is identical to that which otherwise would have been presented to the Board. United argues that the *Sears* qualification requires deference to the state court here because the fraud allegation is a wholly different cause of action, and requires different elements of proof, than the controversy considered by the Board. We would be inclined to agree with United, but for the fact that its fraud allegation is based wholly upon an employee's exercise of protected rights: (1) engaging

[13]Several well recognized (but here inapposite) exceptions to this rule have been developed. See, e.g., *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); *Farmer v. Carpenters*, 430 U.S. 290 (1977); *Youngdahl v. Rainfair*, 355 U.S 131 (1957); *Sears, supra; United Construction Workers v. Laburnum Construction Corp.*, 347 U.S 656 (1954); cf. *New York Tel. Co. v. New York State Dept of Labor*, 440 U.S 519 (1979).

in protected concerted activity; and (2) resorting to the Board to redress the employer's retaliation for engaging in that activity. We must, therefore, consider Anderson's protected activity in our preemption analysis.

In *Sears*, the Court discussed the "primary jurisdiction" rationale of preemption as stated in *Garmon*. Primary jurisdiction, in the preemption cases,

> "[u]nquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board."

436 U.S. 180, 202. The Court went on to hold that:

> "The primary jurisdiction rationale does not provide a *sufficient* jurisdiction for preempting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so."

436 U.S. 180, 202-203 (citation omitted).

We find that, because of the intertwined nature of the controversy here—the fact that United's lawsuit is founded upon the alleged fraudulent exercise, on two occasions, of arguably protected rights—and the overlapping factual findings which are determinative of the issues in both cases, that the case involves the same controversy which could have been presented to the Board or the state court. And, as is apparent, "the party who could have presented the protection issue to the Board," *Sears*, 430 U.S. 180, at 202-203, has done so in this case. Preemption is accordingly required under *Sears*, as well as prior law. See *San Diego Building Trades Council v. Garmon, supra; Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

This conclusion is further mandated by the paramount traditional consideration underlying the labor preemption doctrine: the danger of potential conflict between the state

court and the Board–specifically, as applied here, the "danger of interference with federal protected conduct. . . ." *Sears*, 436 U.S. 180, at 203. As the Court recognized

> "the acceptability of 'arguable protection' as a justification for preemption in a given class of cases is, at least in part, a function of the strength of the argument that § 7 does in fact protect the disputed conduct." 436 U.S. 180, at 203.

Of course, on our review the finding that the conduct herein was protected is a *fait accompli* by Board order. We conclude, however, that in cases of the class before us–employers' civil actions against employees, in the nature of abuse of process and factually based upon the employee's filing of unfair labor practice charges with the Board–all factors require resolution of the employee's unfair labor practice claims in the first instance by the Board. We believe that the Board is uniquely positioned to determine fairly and with presumed expertise whether Anderson was engaged in protected lawful activity, or whether she was abusing the Board's processes as alleged.

In reaching our decision, we also recognize the policy of balance and accommodation embodied in the *Clyde Taylor* doctrine and its progeny, and recognize the restraint with which the Board has exercised its power to find such actions to constitute unfair labor practices over the preceeding [sic] twenty years. See cases cited in footnote 7, *supra*.

Because the Board's findings were supported by substantial evidence on the entire record and because controlling legal doctrine was correctly applied, we grant enforcement.

APPENDIX B

242 NLRB No. 138

FPT
D--5142
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE UNITED CREDIT BUREAU OF AMERICA, INC.

and

Cases 5--CA--8985 and
5--CA--9344

AMALGAMATED LOCAL UNION NO. 1231,
AFFILIATED WITH LABORERS INTERNATIONAL
UNION OF NORTH AMERICA

DECISION AND ORDER

On March 21, 1979, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative

Law Ju[illegible]e, as modified below, and hereby orders that the Respondent, The United Credit Bureau of America, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(e):

"(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 8, 1979

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

D--5142

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against our employees in regard to their hire, tenure, or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT prosecute our Declaration, styled as *The United Credit Bureau of America, Inc. v. Tonia A. Johnson Anderson* (File No. 14370 Superior Court for Baltimore City), which arose out of Anderson's filing of unfair labor practice charges with the National Labor Relations Board, and WE WILL withdraw said Declaration and reimburse Tonia Anderson for all legal expenses she has incurred in defense thereof.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or to refrain from engaging in any or all of the activities specified in Section 7 of the Act. These activities include the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL offer Tonia Anderson immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and WE

WILL make her whole for any loss of earnings she may have suffered as a result of her discharge, with interest.

THE UNITED CREDIT BUREAU OF AMERICA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 W. Lombard Street, 9th Floor, Baltimore, Maryland 21201, Telephone 301-962-2772.

JD-143-79
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE UNITED CREDIT BUREAU OF AMERICA, INC.

and

Cases 5-CA-8985
5-CA-9344

AMALGAMATED LOCAL UNION NO. 1231,
AFFILIATED WITH LABORERS INTERNATIONAL
UNION OF NORTH AMERICA

Gary L. Lieber, Esq., of
Baltimore, MD, for the
General Counsel.
Edward L. Blanton, Jr., Esq.,
of Towson, MD, for the
Respondent.

DECISION

Statement of the Case

DAVID S. DAVIDSON, Administrative Law Judge: The charge in Case 5-CA-8985 was filed on October 31, 1977, by Amalgamated Local Union No. 1231, affiliated with Laborers International Union of North America, hereinafter referred to as the Union. The complaint in that case issued on December 16, 1977, alleging that on or about October 28, 1977, Respondent discriminated against Tonia Anderson by terminating her employment and thereafter refusing to reinstate her because she engaged in protected concerted activities on behalf of her fellow employees and/or because of her union activities, thereby violating Section 8(a)(1) and (3) of the Act. In its answer Respondent denied the commission of any unfair labor practices.

A hearing on that complaint was held before me in Baltimore, Maryland, on March 22, 1978. At the conclusion of the hearing the parties argued orally on the record and were given leave to file briefs.

Thereafter on March 29, 1978, the Union filed the charge in Case 5-CA-8985 and on May 24, 1978, a complaint issued in that case alleging that Respondent violated Section 8(a)(1) and (4) of the Act by initiating and filing a civil lawsuit against Tonia Anderson because she participated in the investigation and gave testimony in Case 5-CA-8985. In its answer Respondent denied the commission of the unfair labor practices alleged in that case.

On May 31, 1978, counsel for the General Counsel filed a motion to reopen the hearing in Case 5-CA-8985 and to consolidate the two complaints. On June 5, 1978, Respondent was ordered to show cause why the General Counsel's motion should not be granted, and on June 6, 1978, Respondent filed an Answer opposing the General Counsel's motion. On June 19, 1978, a telegraphic order issued granting the General Counsel's motion. On June 20, 1978, counsel for the General Counsel filed a motion for judgment on the pleadings in Case 5-CA-9344 or in the alternative for summary judgment.

The reopened hearing was held before me in Baltimore, Maryland, on June 23, 1978. At the outset of the hearing Respondent renewed its objection to the consolidation of the two cases, contending that Respondent was entitled to a hearing before disposition of the General Counsel's motion to consolidate. Counsel for the Respondent was invited to state the matters on which he wished to be heard, and at the conclusion of his statement, the ruling granting the motion to consolidate the two cases was reaffirmed.[1]

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[1] In its post-hearing brief Respondent renews its objection to the consolidation of the two cases contending, among other things, that the ruling on the motion to consolidate was made without first having provided Respondent an opportunity for hearing on the matter and therefore violated Respondent's rights to procedural due process. Respondent also contends that the Administrative Law Judge ordered consolidation of these cases "prior to receipt of Respondent's response in opposition to the

At the hearing I indicated that the time had been inadequate before the hearing to determine Respondent's position with respect to the General Counsel's alternative motions for judgment on the pleadings or summary judgment and sought the positions of the parties with respect to whether or not there was any further evidence required and whether there were issues of fact. Counsel for the General Counsel took the position that there was no further evidence which he wished to produce to support of his case and rested on the pleadings, which included a copy of the Declaration in the state court action.[2] Counsel for the Respondent took the position that there were factual issues relating to Respondent's motivation as to which testimony was required and indicated his intention to call witnesses as to that issue.

After I informed the parties that I was not prepared to grant the General Counsel's motion at that time or to rule that the evidence which Respondent wished to offer was immaterial, I invited counsel for Respondent to go forward with his evidence. Counsel for the Respondent then took the position that if the General Counsel, who had the burden of proof, was not going to present evidence in the proceeding he would not present evidence in rebuttal to "the non evidence that he's presented." I then suggested to counsel for the Respondent that the admitted allegations of the complaint might be sufficient to support an inference that the state court action was filed for the reasons alleged in the complaint and thus require Respondent to go forward to produce evidence to rebut that inference. I stated further, "And this, if you feel that you want to do so, would be the time to do it, and I don't think that the fact that he has rested on the pleadings, means that you either should, or should not, present evidence at this time. This is something, obviously, for you to decide, considering

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Footnote 1 continued:

General Counsel's motion was received and considered before motion for consolidation was granted.

[2]Respondent concedes that it is a true and proper copy of the Declaration.

whatever evidence you have, and the best interests of your client. But it doesn't automatically follow, that because he has rested at this point, that there is nothing further for you to do. That's for you to decide." Counsel for Respondent then proceeded to argue with respect to the General Counsel's motion and did not call any witnesses. After further arguments from counsel the hearing was closed. Briefs have been received from the General Counsel and Respondent.[3]

After the receipt of the briefs, counsel for the General Counsel by letter called my attention to the Decision of the Board in *Power Systems Inc.*, 239 NLRB No. 56, which issued after the close of the hearing and which counsel for the General Counsel contends supports its position in 5-CA-9344. Thereafter Respondent was permitted to file a supplemental memorandum dealing with that decision and its impact on this case.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

I. The Business of Respondent

Respondent, a Maryland corporation engages in compiling and transmitting credit information for commercial accounts. Its principal office is in Baltimore, Maryland. During a representative 12-month period Respondent received in excess of

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[3] In its brief Respondent stated that because the Motion for Summary Judgment was filed just 3 days before the hearing, "the exact purpose of that hearing was never made clear." Respondent also asserts, "The scope of the hearing was limited to the Motions and Cross Motions for Summary Judgment. . . Since no evidence would be put on by the other side, counsel for Respondent moved for a Cross Motion for Summary Judgment." Respondent also asserts that it "awaits the date for proper hearing in this matter." As Respondent was given an opportunity to present evidence at the hearing on June 23 and elected not to do so, there is no occasion for a further hearing to be held in this proceeding, and the issues will be disposed of on the record made in the consolidated proceeding.

$50,000 for services performed for business enterprises in Maryland which in turn during the same period purchased goods and materials valued in excess of $50,000 directly from points outside the State of Maryland. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. The Termination of Tonia Anderson

Tonia Anderson started to work for Respondent in April 1977. At the outset of her employment Anderson acknowledged that she was being employed for a probationary period to last 120 days during which she would be trained to become a useful and productive employee for the Company. She agreed to abide by all company rules, regulations, and policies and indicated her understanding she could be terminated at any time during or after her probationary period if her performance was not up to the standards set by Respondent or if her attendance or punctuality were considered poor. Anderson completed her training at the end of May, 1977, before the end of the 120 day period, and was given a 10 cent hourly increase at that time.

During her employment Anderson often ate lunch with other employees, and the employees discussed among themselves working conditions which they would like to see changed, including a longer lunch period, maternity leave, and annual leave.[4] On October 26 Anderson called the Union's office

[4] I have credited Anderson's uncontradicted testimony as to her conversations with other employees, eight of whom she named on cross-examination. Respondent contends that Anderson should not be credited

where she spoke to its representative Claxton and made an appointment to meet him at noon on the following day to discuss what she and other employees had talked about. On that day Anderson decided against keeping the appointment with Claxton, but later that afternoon went to speak to Patadora Hedrick, second vice president of Respondent, who had general supervisory authority over all the employees in the office. Anderson told Hedrick that she was speaking on behalf of several other employees, that they were not happy with some of the benefits, that some of the others were afraid to come, and that she had come for that reason. Anderson said that they wanted to have Blue Cross and Blue Shield benefits, maternity leave, an extra 15 minutes added to their lunch period, and that some of the employees wanted a day off with pay each month for perfect attendance which they might accumulate as an alternative to a $25 bonus that Respondent was then paying for perfect attendance each month. After Anderson finished Hedrick told her that she would present these matters to the management staff and would get back to Anderson.[5]

Footnote 4 continued:

because her testimony was uncorroborated; because she only divulged the names of the others with whom she spoke at the hearing; because her testimony as to the length of time she worked on her wedding day was contradicted by Respondent's records; because her testimony as to the presence of Susan Roche during a meeting with Respondent's vice-president Hedrick was effectively contradicted; and because she responded evasively when asked about her knowledge of NLRB procedures. As indicated below I do not rely on Anderson's testimony in all respects. However, with respect to this testimony, I note that Respondent made no effort to call any of the employees named by Anderson as witnesses to contradict her, and, even under the versions of Respondent's witnesses, her comments to management officials on October 28 indicate that the requests she made at that time came from other sources as well as herself. I specifically reject Respondent's contention that Anderson was an evasive witness or generally lacking in credibility.

[5] Both Anderson and Hedrick testified to this conversation and their testimony is in agreement with respect to these findings. Their testimony is in conflict as to whether Hedrick was present in her office when Anderson entered; whether employee Susan Roche was present in the office during the conversation; whether Anderson mentioned that some of the

Shortly after Anderson left Hedrick's office, Hedrick went to Respondent's personnel director, Marie Welch, to confer with Welch and executive vice-president Jack Sauber. She told them what Anderson said to her, and according to Hedrick, they discussed whether there was anything that they could do "to save the employee, or the investment in the employee." Hedrick testified that they did not specifically discuss at that time whether to discharge Anderson but that was the only alternative if they could not save her. Welch, testified that they were upset about it "because it's an unusual thing for somebody to come in and say that they want this and they want that, and we felt that if she was discontent working there, she wasn't happy, and, you know, could disrupt other personnel if she got these particular things." At the conclusion of their discussion, they decided to meet with Anderson the next morning with Respondent's treasurer Kimberly also present.

The next morning Anderson was called to an office where the others were present. Sauber asked her what her problems were, and she replied that she didn't have any. Sauber then said that she had come in with demands, and Anderson said that she had only asked questions on behalf of some of the employees who wanted the things that she had requested. After some further dispute over whether Anderson had made demands or asked questions, they discussed several of the things that she had asked for including maternity leave, the additional 15 minutes for lunch, and the proposed alternative to the attendance bonus. Sauber sought to explain why company policy did not provide what Anderson asked for and to explain the benefits which Respondent did provide. During the discussion Anderson also mentioned annual leave, stating that she did

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Footnote 5 continued:

girls were thinking of forming a union; and whether Hedrick told Anderson to let Hedrick see what she could do before bringing in a union and not to say anything to the other girls until Hedrick got back to her. Although resolution of these credibility issues is not free of doubt, I have not relied on Anderson's testimony as to this meeting where contradicted by Hedrick.

not know what it was but that some of the other girls had asked for it.[6] At one point after Anderson had referred to other girls Welch asked her who they were, and Anderson declined to identify them but said that they were people who lived in her neighborhood and worked at the office. Anderson said that she would not identify them because she did not want them to get in trouble. Welch asked why they could not all come and talk to her, and Anderson said that she guessed they did not feel like they could do so. At the end of the meeting Sauber told her that because her attitude toward the job had changed, her work would also change; that she would not be able to do a satisfactory job feeling as she did; and that she was therefore terminated. Anderson shook hands with the others in the room, wished them well, told them it was nice working with them, and was escorted by Welch back to her desk to get her belongings and then leave the building. As Anderson left, Welch told her that she was a good employee and that if she needed a good reference with respect to her job abilities or work performance Welch would give her one.

Hedrick testified that during the course of the meeting the management representatives present decided without discussion to terminate Anderson because "she was. . .demanding in what she wanted, and of course you must have people in a good frame of mind, happy with their job, or they are no good to you." Hedrick also testified "No one in our company fires a person, we have a management meeting, we have a management

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[6] Anderson so testified. Hedrick and Welch agreed that Anderson said that she really didn't know what annual leave was but testified that she said nothing about other girls asking for it. I have credited Anderson that she specifically referred to other girls in the course of explaining her ignorance of the significance of annual leave. In any event, it is not disputed that Anderson characterized annual leave as something she did not fully understand. That alone would indicate that this request originated with employees other than Anderson. In crediting Anderson's testimony as to this conversation I note that she testified without contradiction that at the end of the meeting Sauber removed a tape recorder from his desk and turned it off. I note further that Anderson's testimony as to this meeting was otherwise essentially uncontradicted.

team. If there is a problem, we try and iron it out. In this case, we wanted to save Mrs. Anderson, she was a fairly new employee, and, of course, we had it, but, with her attitude, we had the meeting to try to resolve things. . .there was just no hope."

Following her discharge Anderson contacted the Union and thereafter the charge in this case was filed.

B. The Filing of the Lawsuit Against Anderson

On March 21, the day before the initial hearing in this case, Respondent filed a civil action against Anderson in the Superior Court of Baltimore City.[7] The contents of the Declaration are as follows:

> The Plaintiff, THE UNITED CREDIT BUREAU OF AMERICA, INC., a body corporate of the State of Maryland, by its attorneys, Edward L. Blanton, Jr. and Jay V. Strong, Jr., brings this suit against the Defendant, TONIA A. ANDERSON, and as its cause of action states:
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> For that the Defendant, TONIA A. ANDERSON, on or about 11 April 1977, falsely represented to the Plaintiff her intention to enter into a long-term relationship of employment with the Plaintiff in a capacity for which she was not, by training or experience, suited, that the Defendant knew, at the time she made the foregoing representation, that it was false; that in fact she intended to work no longer than necessary to obtain the benefits of the Plaintiff's training programme and secure a position as a *bona fide* employee of the Plaintiff and thereafter to provoke her discharge under circumstances which would permit her to file an unfair labour practice charge against the Plaintiff in the expectation that the Plaintiff would elect, as a matter of expediency, to accept an offer of settlement;

[7] It appears that the Declaration in the civil action was served on Anderson after the initial hearing in this case.

that such settlement offer would, under standard procedures well known to the Defendant, be made on her behalf by the National Labour Relations Board, pursuant to which she would be offered reinstatement to her former position and payment of full wages for the period between the date of her discharge and the date Plaintiff accepted the offer of settlement, the effect of which would have been to secure for the Defendant a "paid vacation" to which she was not entitled, but which she would receive if her scheme were successful; that the false representation of her intentions was made to persuade the Plaintiff to pay her while she participated in its training programme and to expend its money to provide instruction for her, which expenditures the Plaintiff made in the expectation that she intended to work for Plaintiff for a sufficient period to compensate Plaintiff for the time and money to train her; that the Plaintiff relied upon her representations and had the right to rely upon her representations with full belief in their truth; and had the Plaintiff not believed that the Defendant did not intend to so work, the Plaintiff would not have agreed to expend its time and money to train her; that the Plaintiff believed the Defendant's representations to be truthful, did hire the Defendant and provide training for her, at great cost and expense to the Plaintiff and, in addition, paid the Defendant a full-time salary during the period she was being trained; that within ninety (90) days after her training period had been completed, the Defendant deliberately provoked an incident which she knew would lead to her dismissal as an employee of Plaintiff by making unreasonable demands upon the Plaintiff to change the conditions under which she worked, which conditions were explained to her prior to her accepting employment with the Plaintiff and to which conditions she implicitly agreed by accepting employment; that she was, as a direct consequence of the incident, dismissed, and she immediately thereafter filed a complaint of unfair labour practice against the Plaintiff; that an offer in settlement was immediately made after a perfunctory investigation by the National Labor Relations

Board, that, if the Plaintiff had accepted such offer, it would have been required to reinstate the Defendant and pay her back wages between the date of her dismissal and the date of her reinstatement; that the damages sustained by the Plaintiff as a result of the fraud perpetrated by the Defendant consist of wages paid to the Defendant by the Plaintiff during the training period, the *pro rata* cost of operating Plaintiff's training department during the period in which the Defendant was being trained by the Plaintiff and the cost of defending the charge of unfair labor practice filed by the Defendant against the Plaintiff;

WHEREFORE, the Plaintiff claims the sum of TEN THOUSAND ($10,000.00) DOLLARS

As set forth above at the reopened hearing the General Counsel rested on the pleadings and Respondent offered no further evidence.

C. Concluding Findings as to Anderson's Discharge

The General Counsel contends that Anderson was discharged because she engaged in protected concerted and/or union activities. Respondent contends that it had no knowledge of any union activities engaged in by Anderson and that Respondent discharged Anderson because of her attitude and not because of her concerted activities. Respondent contends that the only evidence of concerted activity was Anderson's uncorroborated statement that she was looking forward to group action, a statement which the Company did not believe and had no reason to believe because Anderson refused to say who the others in the group were and no one came forward to support her demands. Respondent also contends that there was no evidence that her demands were made for the purpose of inducing group action and that it viewed her demands as a series of individual complaints relating to working conditions on her own behalf.

The only evidence that Respondent was aware of any union activity is Anderson's testimony as to what she told

Hedrick at the outset of their conversation on October 27, which I have indicated above I have not relied on. Accordingly, I find that the evidence does not support a finding that Anderson's termination violated Section 8(a)(3) of the Act.

I find further however, that the evidence does establish that Anderson engaged in protected concerted activity, that Respondent knew of that activity, and that Anderson was discharged because of it. Anderson's request or demands, however characterized, were not merely for improvement of her personal working conditions. It is undisputed that she stated clearly that she was asking for benefits on behalf of herself and other employees. No witness testified that Anderson's claim was not believed or that disbelief of Anderson in any way entered into the decision to terminate her, and any doubt should have been substantially dispelled by Anderson's statement about the request for annual leave. Surely if Anderson were speaking only for herself, she would have known what she was asking for.

Whether or not Anderson had in fact talked to any other employee before asking Hedrick for improvement of her benefits and those of other employees, her request to Hedrick, which she repeated the next day, in any event constitutes protected concerted activity. Thus, in *Alleluia Cushion Co., Inc.*, 221 NLRB 999, the Board held that in the absence of evidence that other employees do not share the expressed interests and concerns, the test of concerted activity is not whether an employee acts alone without any outward manifestation of support for his efforts but whether his complaint or objective is a matter of common interest and concern to his fellow employees.[8] Moreover, as I have credited Anderson that she had discussed with other employees the matters she raised with Hedrick, the protected concerted nature of her activities is clear.

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[8]See also *Key City Mechanical Contractors, Inc.*, 227 NLRB 1884; *Air Surrey Corporation*, 229 NLRB 1064; *Pink Moody, Inc.*, 237 NLRB No. 7; and *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB No. 9.

Respondent contends that it discharged Anderson because of her attitude rather than her protected concerted activities. However, Hedrick's testimony quoted above as to the reasons for Anderson's discharge as well as Sauber's statements to Anderson when he told her she was discharged show that the only manifestation of attitude for which Anderson was discharged was her request for improved benefits for herself and others which to Respondent indicated that she was an unhappy employee whose work would inevitably suffer and who had to be removed from the work force.

There can be no question in this case that Anderson's termination was directly caused by the requests she made to Respondent. Even if Respondent truly viewed these requests as indicating that her work would necessarily suffer, Respondent's subjective intent is not determinative. It is sufficient that it can reasonably be said that Respondent's conduct in this case tended to interfere with the free exercise of employee rights under the Act and therefore violated Section 8(a)(1) of the Act.[9] In any event, however, the circumstances of this case and the testimony of Hedrick and Welch as to the reasons for Anderson's discharge warrant the inference that they viewed Anderson as a troublemaker for seeking better conditions of employment and sought to rid the office of her immediately to put an end to any further employee activity aimed at changing working conditions. It is impossible to escape the conclusion that Sauber, Hedrick and Welch intended specifically that Anderson's discharge interfere with employee rights.[10] The rights exercised by Anderson in this case go to the heart of Section 7, and acceptance of the justification advanced by Respondent would reduce those rights to a hollow shell.

As part of its defense Respondent contends that Anderson's objective in airing her complaints was to obtain time off from work with pay indirectly by bringing about her dismissal

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[9] *San Lorenzo Lumber Company*, 238 NLRB No. 198; *Ross Valley Savings Loan Association*, 194 NLRB 270.

[10] Cf. *Wanda Petroleum Company*, 183 NLRB 363, 371, enf'd 444 F. 2d 217 (C.A. 5).

and filing a charge with the NLRB in the expectation that rather than litigate the case Respondent would accept a settlement and pay her for the time lost from her employment. Respondent submits this contention along with evidence as to her attitude toward prior employment and toward her job with Respondent in the attempt to show that Respondent was justified in dismissing her for her attitude. The only evidence offered to support this contention was that Anderson had recently married, that she had not had time off for a honeymoon, that she had been unhappy because she was not granted sufficient time off on her wedding day, and that she believed a prior employer had failed to treat her properly after she had incurred personal damage and loss in the course of her duties on that job. On the evidence, the premise of this defense is pure speculation. Furthermore, those who discharged Anderson relied on nothing more than her requests for improved benefits in deciding to discharge her. Finally, Respondent was not coerced or entrapped into discharging Anderson for engaging in protected activity, and it is hardly a matter of defense that an employee could count on her employer to discharge her unlawfully in scheming to procure her own discharge.

I find that Anderson's discharge violated Section 8(a)(1) of the Act.

D. Concluding Findings as to the filing of the Civil Action

In its civil action Respondent seeks damages of $10,000 from Anderson on the grounds that she defrauded Respondent by falsely representing to Respondent an intention to enter into a long-term relationship of employment while intending to work no longer than necessary to obtain training and thereafter to provoke her discharge under circumstances which would permit her to file a charge against Respondent in the expectation that Respondent would elect as a matter of expediency to accept an offer of settlement rather than litigate her discharge thus providing her a paid vacation to which she was not entitled. As damages Respondent claims the wages paid by

Anderson during her training period, the *pro rata* cost of Respondent's training program during the period of Anderson's training, and the cost of defending against the charge.

The General Counsel contends that Respondent's filing of the lawsuit constituted discrimination against Anderson because she participated in the Board investigation and testified with respect to the charge based upon her discharge and that it also necessarily had the effect of interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. Respondent contends that the filing of the lawsuit without more is not sufficient evidence to sustain either contention because Anderson was not aware of the filing of the lawsuit at the time that she participated in the investigation or testified at the hearing on the complaint based on her discharge. Respondent also contends that the General Counsel has failed to prove Respondent's retaliatory motivation or that Anderson was an employee within the meaning of the National Labor Relations Act at the time the suit was filed.

With respect to the latter contention Respondent asserts that there is an issue of fact which was not litigated as to Anderson's employee status because it has information and believes that Anderson had other regular and substantially equivalent employment prior to the time the suit was filed and the General Counsel did not prove otherwise. I find no merit in this contention. An employee of the employer responsible for the unlawful discharge merely because she takes interim employment to mitigate backpay liability, and taking such employment does not extinguish re-employment rights. Such rights continue until there has been a valid offer of reinstatement.[11] As Respondent was the wrongdoer responsible for Anderson's discharge, it was its burden to show any circumstances which might terminate Anderson's status as an employee. As Respondent did not do so, this contention is rejected.

The remaining contentions are largely disposed of by the Board's Decision in *Power Systems, Inc.*, 239 NLRB No. 56.

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[11] *The Richard W. Kaase Company*, 162 NLRB 1320, 1331.

There, noting that the Board with court approval has given an expansive scope to the protections afforded by Section 8(a)(4), the Board held that the employer violated Section 8(a)(4) and (1) of the Act by instituting a civil action for damages against its employee Sanford for allegedly filing a charge with the Board without probably [sic] cause and for the purpose of harassing the employer.[12] The Board found that there was no evidence to show that Sanford lacked probable cause for filing his charge or that he did so with the purpose of harassing his employer, and that the evidence relied on by the employer negated its assertion that it had reasonable grounds for its lawsuit. The Board found further that the complaint and amended complaint filed by the employer were clear evidence that the true purpose behind its civil action was to penalize Sanford for asserting his rights under the Act and to discourage him and other employees from further asserting those rights. Finally, the Board found that the doctrine of *Clyde Taylor d/b/a Clyde Taylor Company*, 127 NLRB 103, did not preclude it from basing any finding of an unfair labor practice on the filing of the lawsuit because the lawsuit was brought in order to pursue an unlawful objective of penalizing Sanford for filing a charge and thus depriving him of access to Board processes and discouraging its employees generally from seeking such access.

Here, while the civil action sounds of fraud, the key element on which it is based is Anderson's filing of the charge in 5-CA-8985, for only by the filing and pursuit of the charge on Anderson's behalf could the alleged scheme have been carried to fruition. Otherwise Anderson could not have reaped any benefit from provoking her own discharge.

Here, unlike *Power Systems, Inc.*, Anderson's charge had sufficient merit to cause the Regional Director to issue a complaint. As a consequence, also unlike *Power Systems, Inc.*, there was a hearing on that complaint at which Respondent made contentions almost identical to the allegations in the

[12]The complaint was later amended to allege that the charge was wrongful, malicious, willful, wanton, harassing, and vexatious.

Declaration as to Anderson's motivation in seeking improved benefits and filing her charge. Unlike *Power Systems, Inc.*, it need not even be considered whether Anderson had probable [sic] cause for filing her charge, for clearly she did. Also, as has been pointed out above, the alleged scheme of Anderson is based on no more than speculation. At the initial hearing on Anderson's discharge, Respondent failed to produce any substantial evidence in support of its contention, and when offered the opportunity to present further evidence as to its motivation at the reopened hearing on the consolidated complaint Respondent declined to present any further evidence.

The conclusion is compelled, and indeed more strongly than in *Power Systems, Inc.*, that the Respondent's civil action was filed purely for purposes of retaliation to punish Anderson for seeking redress for her discharge from the Board and to discourage other employees from ever emulating Anderson in seeking to enforce their rights, just as Anderson's discharge was intended to quell any attempt to engage in concerted activity for the purpose of improving their benefits.

That Anderson may not have been made aware of the civil action until after she had testified does not negate the inference of punitive intent, for by its nature punishment follows the deed, and the discouragement of Respondent's other employees is not diminished because the Declaration was not served until after Anderson testified in this proceeding.

Respondent's alternative contentions that *Power Systems, Inc.*, was wrongly decided and in any event distinguishable must be rejected. Apart from my disagreement with Respondent's contention as to the correctness of the Board's Decision, I am constrained to follow Board precedent until reversed by definitive court action. The fact that the employee in *Power Systems, Inc.*, was a union steward does not distinguish the cases. Respondent's assertion that the Board should be more jealous of the right of union representatives to file charges than of the rights of individuals is baseless. Any individual has the right to file charges, and the Act affords no special status to those holding union office. Respondent's other contentions are based on the assumption that Anderson abused Board processes, are contrary to the facts, and are without merit.

Accordingly, I find that Respondent, by filing its civil action against Tonia Anderson in the Superior Court of Baltimore City, Maryland, violated Section 8(a)(4) and (1) of the Act.

IV. The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged Tonia Anderson, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former job, without prejudice to her seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered as a result of her discharge by payment to her of the amount she normally would have earned from the date of her discharge until the date of Respondent's offer of reinstatement, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB 651.[13]

In order to dissipate the effect of Respondent's filing of the civil action against Tonia Anderson I shall further recommend that Respondent be ordered to cease and desist from prosecuting said civil action and to withdraw it. In order to restore Anderson to the position she would have been in absent Respondent's violation of Section 8(a)(4) and (1) of the Act, I shall recommend that Respondent be ordered to make Anderson whole for all legal expenses she has incurred in defense of Respondent's civil action.[14]

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

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[13] See, generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[14] *Power Systems, Inc.*, 239 NLRB No. 56.

V. Conclusions of Law

1. The United Credit Bureau of America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Amalgamated Local Union No. 1231, affiliated with Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Tonia Anderson because of her protected concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

4. By filing a Declaration in the Superior Court of Baltimore City, Maryland, which seeks damages from Tonia Anderson based on the allegation that Anderson filed charges against Respondent as part of a fraudulent scheme, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(4) and (1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[15]

ORDER

Respondent, The United Credit Bureau of America, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment or any

[15] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

(b) Prosecuting its Declaration styled as *The United Credit Bureau of America, Inc. v. Tonia A. Johnson Anderson* (File No. 14370, Superior Court for Baltimore City), which arose out of Anderson's filing of unfair labor practice charges with the National Labor Relations Board.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Tonia Anderson immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered as a result of her discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Withdraw its Declaration, styled as *The United Credit Bureau of America, Inc. v. Tonia A. Johnson Anderson* (Filed No. 14370) which Respondent caused to be instituted against Tonia Anderson in the Superior Court of Baltimore City, Maryland and reimburse Tonia Anderson for all legal expenses she has incurred in the defense thereof.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with paragraph (a) above.

(d) Post at its Baltimore, Maryland place of business copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the receipt of this Decision what steps have been taken to comply herewith.

Dated, Washington, D. C. March 21, 1979

/s/ _____
David S. Davidson
Administrative Law Judge

[16] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 (3-80)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discharge or otherwise discriminate against our employees in regard to their hire, tenure, or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL offer Tonia Anderson immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered as a result of her discharge.

WE WILL NOT prosecute our Declaration, styled as The United Credit Bureau of America, Inc. v. Tonia A. Johnson Anderson (File No. 14370 Superior Court for Baltimore City) which arose out of Anderson's filing of unfair labor charges with the National Labor Relations Board, and WE WILL withdraw said Declaration and reimburse Tonia Anderson for all legal expenses she has incurred in defense thereof.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or to refrain from engaging in any or all the activities specified in Section 7 of the Act. These activities include the right to self-organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

THE UNITED CREDIT BUREAU OF AMERICA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 W. Lombard Street - 9th Floor Baltimore, Maryland 21201 (Tel. No. (301) 962-2772)

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

No. 80-2021

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE UNITED CREDIT BUREAU OF AMERICA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner filed a lawsuit in state court against an employee in retaliation for her having filed an unfair labor practice charge against petitioner.

2. Whether the Board properly ordered petitioner to cease prosecuting its civil action against the employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 643 F.2d 1017. The Decision and Order of the National Labor Relations Board (Pet. App. A18-A43) is reported at 242 N.L.R.B. 921.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1981. A petition for rehearing was denied on April 24, 1981. The petition for a writ of certiorari was filed on June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at page 3 of the petition.

STATEMENT

1. Tonia Anderson was discharged from her job with petitioner on October 28, 1977, one day after she had expressed dissatisfaction with certain employee benefit to an official of the company on behalf of herself and several other employees (Pet. App. A2-A3, A-22). Anderson was told that she was terminated because "her attitude toward her job had changed" (*id.* at A3). The General Counsel of the National Labor Relations Board issued an unfair labor practice complaint alleging, *inter alia*, that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Anderson because she had engaged in protected concerted activities (Pet. App. A3).

On March 21, 1978, one day before an unfair labor practice hearing was scheduled to begin, petitioner filed a civil suit in the Superior Court of Baltimore City seeking $10,000 in damages against Anderson, alleging that she had schemed to defraud petitioner by provoking her own discharge with the expectation of receiving a cash settlement from petitioner after unfair labor practice charges were filed with the Board (Pet. App. A3 & n.3). At the March 22 unfair labor practice hearing, petitioner contended that it had not discharged Anderson because of her protected activities but because of her "attitude." As part of its defense, petitioner repeated the allegation made in its civil suit that Anderson had aired her complaints in order to provoke petitioner into discharging her so that she could realize a settlement for the time lost from employment (*id.* at A34-A35).

Upon receiving service of the civil complaint in the state court action, Tonia Anderson filed a charge

with the Board.[1] The General Counsel of the Board issued a second complaint against petitioner, alleging that petitioner had violated Section 8(a)(4) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (1), by filing its suit against Anderson in state court in retaliation for the initial charge. The second proceeding was consolidated with the earlier one, and the presiding administrative law judge (ALJ) reopened the hearing previously conducted. The General Counsel filed a motion for summary judgment or, in the alternative, for judgment on the pleadings (Pet. App. A4-A5).

A second hearing was held on June 23, 1978.[2] At the outset petitioner's counsel indicated that petitioner intended to offer testimony demonstrating a lawful motive for its having filed the suit against Anderson. The ALJ denied the General Counsel's motion for summary judgment (Pet. App. A6, A24-A25). The General Counsel introduced into evidence a copy of the declaration against Anderson filed by petitioner in state court and rested his case. Petitioner's counsel chose to present no evidence, asserting that the General Counsel had not satisfied his burden of going forward (*id.* at A6, A23-A25). The ALJ cautioned petitioner that evidence had been presented which would withstand a motion to dismiss and that, if petitioner had evidence to present in defense, "this * * * would be the time to do it" (*id.* at A24). Petitioner declined to present any evidence and the hearing was closed.

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[1] Anderson was not served until after the close of the March 22 hearing (Pet. App. A4).

[2] The hearing was initially scheduled for June 27. The ALJ notified the parties by telegraphic order that it had been rescheduled for June 23 (Pet. App. A8-A9).

2. The ALJ, whose decision was adopted by the Board (Pet. App. A18), found that petitioner violated Section 8(a)(1) of the Act by discharging Anderson because she had complained about working conditions (Pet. App. A35). In rejecting petitioner's assertion that Anderson had, in effect, set up her own discharge, the ALJ stated (*ibid.*):

> The only evidence offered to support this contention was that Anderson had recently married, that she had not had time off for a honeymoon, that she had been unhappy because she was not granted sufficient time off on her wedding day, and that she believed a prior employer had failed to treat her properly after she had incurred personal damage and loss in the course of her duties on that job. On the evidence, the premise of this defense is pure speculation. Furthermore, those who discharged Anderson relied on nothing more than her requests for improved benefits in deciding to discharge her. Finally, Respondent was not coerced or entrapped into discharging Anderson for engaging in protected activity, and it is hardly a matter of defense that an employee could count on her employer to discharge her unlawfully in scheming to procure her own discharge.

The ALJ further found that petitioner had filed its civil suit against Anderson in retaliation for her filing the unfair labor practice charge and had thus violated Section 8(a)(4) and (1) of the Act (Pet. App. A36-A38).

The Board ordered petitioner, *inter alia*, to reinstate Anderson with backpay, to cease prosecution of the civil action, and to make Anderson whole for all legal expenses incurred in defending against the civil action (Pet. App. A18-A19, A40-A42).

3. The court of appeals upheld the Board's decision and granted enforcement of its order (Pet. App. A1-A17). The court agreed with the Board that the prosecution of a lawsuit against an employee in retaliation for filing charges with the Board violated Section 8(a)(4) and (1) of the Act (Pet. App. A12-A13). The court further found that substantial evidence supported the Board's finding of a retaliatory motive here (*id.* at A13-A14), explaining:

> The Board's decision was based upon the testimony concerning Anderson's activities and discharge, and the declaration filed in the state court. This evidence amply supports the Board's finding that Anderson's original charge was meritorious * * *. Moreover, United did not adduce any evidence which would support its fraud theory.

Finally, the court rejected petitioner's contention that under *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 202-203 (1978), it was entitled to secure resolution of the controversy in the state court system (Pet. App. A15). The court stated (*id.* at A16; citations omitted):

> We find that, because of the intertwined nature of the controversy here—the fact that United's lawsuit is founded upon the alleged fraudulent exercise, on two occasions, of arguably protected rights—and the overlapping factual findings which are determinative of the issues in both cases, that the case involves the same controversy which could have been presented to the Board or the state court. And, as is apparent, "the party who could have presented the protection issue to the Board," *Sears*, 430 U.S. 180, at 202-203, has done so in this

case. Preemption is accordingly required under *Sears*, as well as prior law.

Chief Justice Burger denied United's application for a stay of the judgment of the court of appeals on June 8, 1981.[3]

ARGUMENT

1. As the court of appeals noted with approval (Pet. App. A10, A17), it is the Board's policy that it "should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice," but that a lawsuit, or a threat to file one, nevertheless violates the Act if it is "a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." *Clyde Taylor Co.*, 127 N.L.R.B. 103, 108 (1960); see, *e.g.*, *International Organization of Masters, Mates and Pilots, AFL-CIO* (*Cove Tankers*), 224 N.L.R.B. 1626 (1976), aff'd, 575 F.2d 896 (D.C. Cir. 1978); *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 779-780 (1976); *United Stanford Employees, Local 680, SEIU, AFL-CIO* (*Leland Stanford Junior University*), 232 N.L.R.B. 326, 331 (1977).

Petitioner does not dispute this policy. Rather, it contends that there was no proof of retaliatory motivation here. That question, which turns on the particular facts of this case, raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is no merit to petitioner's assertion (Pet. 8-10) that the Board was not entitled to infer unlawful motive from the evidence.

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[3] Petitioner erroneously states (Pet. 7) that the stay was granted.

On the contrary, the Board may draw such inferences "as reasonably may be based upon the facts proven." [4] *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 49 (1954). The evidence here showed that petitioner's contention, on which its civil suit was based, that Anderson had concocted a scheme to engineer her own discharge and reinstatement with backpay, was totally unfounded. In the absence of any further justification for the civil suit, the Board was plainly entitled to infer that it had a retaliatory motive.

Contrary to petitioner's contention (Pet. 9-10), there is no conflict between this case and *Power Systems, Inc.* v. *NLRB*, 601 F.2d 936 (7th Cir. 1979). In *Power Systems* (*id.* at 940), the Seventh Circuit did not dispute the Board's position that an improper motive could be inferred from a determination that the employer "lacked a reasonable basis for its suit" (*id.* at 939). The *Power Systems* court differed only with the Board's conclusion therein that the particular employer's suit lacked a reasonable basis. The court of appeals below took note of *Power Systems* and carefully examined the key factual distinction in a discussion (Pet. App. A11-A12 & n.11) upon which we rely.[5]

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[4] Petitioner's assertion (Pet. 9) that "inferences [were] drawn from naked pleadings alone" was rejected by the court of appeals (Pet. App. A13-A14). Similarly, petitioner's assertion (Pet. 5-6) that it was deprived of an opportunity to present evidence of a non-retaliatory motive by vagueness in the Board's hearing notice was specifically rejected by the court which found petitioner's failure to present evidence at the reopened hearing to have been a tactical decision (Pet. App. A8-A9).

[5] *Associated General Contractors of North Dakota* v. *NLRB*, 637 F.2d 556, 562 (8th Cir. 1980), cited by petitioner (Pet. 9), is inapposite. There the court upheld the Board's

2. Petitioner's reliance (Pet. 11-13) on *Sears, Roebuck & Co.* v. *Carpenters, supra*, for the proposition that the Board improperly ordered cessation of its state court action is misplaced. There the Court rejected a claim that state court jurisdiction of a trespassing claim arising out of union picketing on an employer's premises was preempted by the National Labor Relations Act, in circumstances where no proceedings before the Board had been commenced, and where, as a consequence, no other determination of the merits of the underlying question of labor law was available. 436 U.S. at 185-187, 202, 203 n.34. Unlike the present case, which arose on petition for review of the Board's order and a cross-application for enforcement thereof, *Sears* arose from purely judicial proceedings in the state courts of California. Here, however, the Board was not required to con-

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finding that an employer did not violate Section 8(a)(1) by seeking to enforce in state court a clause of a collective agreement, irrespective of whether the clause was unlawful. The court there held that an unlawful motive was required to make out a violation; it did not hold that such a motive could not be inferred from the totality of the circumstances. Similarly, in *Bergman* v. *NLRB*, 577 F.2d 100, 104-105 (9th Cir. 1978), the court upheld the Board's finding that a union did not violate the Act by filing suit for the purpose of establishing a breach of contract. The court noted (*id.* at 104) that "[t]here is no suggestion that * * * the union's [suit] approaches malicious prosecution or abuse of process. * * * There is no indication that the union did anything other than attempt, in good faith, to enforce a facially valid and binding labor agreement." Accord: *Lodges 743 and 1746, International Association of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 463-465 (2d Cir. 1975) (upholding Board's finding that the employer did not violate the Act by instituting a civil suit against the union to recover for property damage due to striker violence).

clude that the state court was divested of jurisdiction of the subject matter of petitioner's civil suit by the existence of the National Labor Relations Act. Rather, the Board simply found that petitioner's maintenance of that suit was unlawful discrimination against the employee Anderson based on her exercise of rights substantively protected by the Act. Indeed, the *Sears* Court noted that "[a]part from notions of 'primary jurisdiction,' * * * there is a constitutional objection to state-court interference with conduct actually protected by the Act" (436 U.S. at 199; footnotes omitted). Accordingly, the preemption analysis established in *Sears* has no application here.

Nor, if the *Sears* preemption analysis were applicable, would the decision below be inconsistent with it. In *Sears* the Court held (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court added, however, that state court jurisdiction was not preempted "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). That qualification has no application here. Here, the Board's processes had been invoked. As the court of appeals noted, petitioner's civil suit "is based wholly upon an employee's exercise of protected rights" (Pet. App. A15) which were the subject of the Board's proceedings. Anderson's conduct was found to be protected and petitioner's conduct was found to be prohibited by the Act. In these circumstances, nothing in *Sears* permits petitioner to relitigate those determinations

in state court. Were petitioner's contention accepted, this Court's decision in *Sears*, which rested upon a perceived gap in the remedies available through the Board's processes, see 436 U.S. at 202, would itself become a means of preventing the Board from affording relief from violations of the National Labor Relations Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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